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Issue Date: 26 May 2005

CASE NO.: 2004-LHC-921

OWCP NO.: 07-161642

IN THE MATTER OF

JAMES GALLIANO,
Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS/
AVONDALE INDUSTRIES, INC.,
Self-Insured Employer

APPEARANCES:

Andrew Horstmyer, Esq.
On behalf of Claimant

Frank Towers, Esq.
On behalf of Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by James Galiano (Claimant) against Northrop Grumman Ship Systems, Incorporated /Avondale Industries, Incorporated (Employer). The formal hearing was conducted in

Metairie, Louisiana on September 20, 2004. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits A-B, and Employer's Exhibits 1-38. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. That the date of the injury/accident was October 3, 2001;
2. That the injury was in the course and scope of employment;
3. That an employer/employee relationship existed at the time of the accident;
4. That Employer was advised of the injury on October 3, 2001;
5. That a Notice of Controversion was filed on June 18, 2003;
6. Nature and extent of disability:
    (a) Temporary total disability: October 4, 2001 to October 17, 2001; and July 24, 2002 to June 13, 2003;
    (b) Temporary partial disability: October 3, 2001 to June 2003;
    (c) Medical benefits have been partially paid; and
7. Maximum medical improvement has not yet been reached.

Issues

The unresolved issues in this proceeding are:

1. Average weekly wage;
2. Medical benefits due;
3. Indemnity benefits due; and
4. Interest, penalties, and attorney fees.

[1] The parties were granted time post hearing to file briefs. This time was extended up to and through April 22, 2005.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

Statement of the Evidence
Testimonial Evidence

James Galiano

Claimant is 42 years old and has an eleventh grade education. He testified that he can read "somewhat," but cannot read the newspaper because he does not understand the words. He cannot write a letter but can write his name. He can complete a job application with assistance. Tr. 16.

Claimant discussed his work history, stating that his first job was as a deckhand on various boats, off and on for about twelve years. Claimant then worked for Reagan Offshore as a laborer, and later worked sandblasting and painting as a helper for several employers.[3] Claimant worked for Shaw in 1999 and in August 2001 he was hired by Employer as a sandblaster.

On October 3, 2001, Claimant was sandblasting and noticed that he was getting too much sand in his hose. He took his hood off and put on a hard hat and safety glasses, and told another employee to turn the sand level down. When he returned to his work area, he took his hard hat off in order to put his hood back on, but in the process, a scaffolding beam fell due to the vibration caused by the sandblasting and hit Claimant on the head. Tr. 21. Claimant said he was "knocked out," and when he came to, other employees were still sandblasting. He left the area when a friend saw him and took him to "Deke" the foreman. Deke sent Claimant to the infirmary, and Claimant was then taken to the hospital where he recalled seven staples were put in his head laceration. Tr. 23., EX 1, EX 31.

Claimant did not work for two weeks following his accident. He returned to work on October 17, 2001, he claims, because Employer did not allow him to have an MRI performed. Claimant worked for Employer until July 24, 2002 when he quit because he could not tolerate the pain any longer. Claimant testified that he worked in pain since his accident.

Claimant treated with Dr. Shamsnia but could not recall when he started treating with him. Dr. Shamsnia referred Claimant to Dr. Awasthi, a neurosurgeon, who Claimant said presented him with three options: Claimant could have had some "dye" injected with a needle, which would not fix Claimant's problems, nor would the option of therapy. Claimant said that Dr. Awasthi told

[3] Claimant explained a gap in his work history stating he was in prison for nearly three years due to a parole violation. Tr. 19.

him that surgery would improve his condition. Claimant said he "wanted it fixed" so he could return to work. Claimant recalled Dr. Awasthi scheduled the surgery on December 10,[4] but when Claimant attended his pre-op appointment on December 9, he was told that Employer denied the surgery. Tr. 27.

Claimant testified that Dr. Shamsnia initially prescribed Vicodin ES, but the medication was "not strong enough," so he switched Claimant to Lortab and gave him sixty pills per month. Claimant said that sixty pills was insufficient to treat his pain, so Dr. Shamsnia increased the prescription to one hundred pills per month, and Claimant became addicted to Lortab. Claimant explained that he had sustained a previous-work related injury with Shaw and was receiving another prescription for Lortab from Dr. Manale, consequently, he was taking concurrent Lortab prescriptions. Tr. 31.

Claimant eventually told Dr. Shamsnia that he was taking thirty to forty pain pills per day. Dr. Shamsnia recommended a drug rehabilitation program and treatment with a psychiatrist, which Claimant stated Employer denied. Dr. Shamsnia reduced Claimant's medication, and now Claimant's fiancée controls his medication. Claimant stated that he currently experiences the most pain in his neck, and though he continues to have pain in his lower back, it is not nearly as bad as the pain in his neck.

On cross-examination, Claimant acknowledged that in 2004 he was charged with battery of a police officer, damage to property, resisting arrest and violating an order of protection. Tr. 34. Claimant maintained that he lost consciousness when the beam hit him on the day of the accident, though hospital records state he denied loss of consciousness and he did not remember telling anyone at Employer's facility that he lost consciousness. Tr. 37. The notes from Employer's infirmary state that Claimant did not report a loss of consciousness. EX 1, p. 2. The notes from West Jefferson Medical Center state that Claimant denied loss of consciousness. EX 31, pp. 2-3.

Claimant said that he injured his head and neck in the accident. He acknowledged that he was involved in a slip and fall accident at Home Depot on April 5, 2003. He said he injured his back in that accident, but did not know whether he injured his neck, because, he explained, he had constant neck pain since his October 2001 accident with Employer. He recalled that after the Home Depot accident, Dr. Shamsnia said that his neck did not worsen. Claimant stated

[4] Claimant could not recall which year.

that he could not tell whether his neck is worse due to the Home Depot accident; he simply could not say whether his neck was worse, the same, or better. Tr. 45.

Claimant was also involved in a motor vehicle accident on July 3, 2003, which resulted in his car being totaled, though Claimant explained that the car is now repaired and running. Claimant was deposed regarding that accident and stated therein that his neck and back were hurting again. Claimant agreed that if Dr. Shamsnia stated that the car accident aggravated Claimant's neck, he would believe Dr. Shamsnia. Tr. 48.

Claimant testified that he thought he was addicted to Lortab before 2004, though in his deposition he stated he became addicted in February 2004. Claimant could not recall whether his Lortab usage increased after the Home Depot accident and the car accident. Tr. 54.

Morteza Shamsnia, M.D.

Dr. Shamsnia is a board-certified neurologist whose deposition was taken on January 18, 2005. EX 36. Dr. Shamsnia's records indicate that he initially treated Claimant on October 9, 2001, where Claimant reported his work-related accident and stated he "lost consciousness for a brief second." EX 2, p. 2. He noted that Claimant was treated at West Jefferson Medical Center where he required four stitches for his head laceration. Claimant complained of headaches that Dr. Shamsnia described as localized on the front temporal area on the right side. Claimant also complained of neck pain and pain in the back of his head. Dr. Shamsnia examined Claimant and determined that Claimant had post traumatic headaches, neck pain and paresthesia in the hand. He recommended light duty work, an MRI of the head and an EEG, and prescribed Vicodin ES and Flexeril. Dr. Shamsnia testified that loss of consciousness is important from a neurological perspective because when consciousness is not lost, the intensity of the head trauma is lowered. EX 36, p. 8.

Dr. Shamsnia next saw Claimant on October 17, 2001, where Claimant continued to complain of headaches and his stitches were removed. EX 2, p. 5. Dr. Shamsnia returned Claimant to regular, full duty. On November 28, 2001, Claimant complained of severe headaches on a daily basis, which he claimed interfered with his daily activities. Claimant stated that Elavil made him drowsy so Dr. Shamsnia changed his medication to Neurontin. EX 2, p. 6. On December 19, 2001, Claimant reported his headaches were under control with Neurontin.

Claimant underwent an MRI of his head and an EEG on January 19, 2002. Claimant's MRI was normal, and Dr. Shamsnia explained that abnormalities are usually present in cases of severe head trauma. He stated that the MRI implied that Claimant had a mild concussion or head injury. EX 36, p. 10. Claimant's EEG results were also normal. Dr. Shamsnia testified that based on the radiological evidence, it was fair to say that Claimant suffered a mild head injury on October 3, 2002. EX 36, p. 10. Dr. Shamsnia discussed the results of the diagnostic tests with Claimant on January 22, 2002, and noted that Claimant complained of headache and neck pain. EX 2, p. 8.

On March 19, 2002, Claimant visited Dr. Shamsnia and continued to complain of neck pain and headaches. Dr. Shamsnia recommended diagnostic testing as soon as possible. EX 2, p. 9. Claimant returned on May 28, 2002, where he complained of headache and neck pain. Claimant stated he developed neck pain radiating from his neck down into his upper extremities after his accident at work. Dr. Shamsnia requested an EMG and nerve conduction velocity study of Claimant's upper extremities in order to rule out cervical radiculopathies which were indicatively related to Claimant's head trauma. EX 2, p. 10. On July 24, 2002, Claimant complained of increased headaches and increased neck pain. Dr. Shamsnia removed Claimant from work "until further notice." EX 2, p. 64. Dr. Shamsnia testified that he removed Claimant from work because his complaints had increased in severity. Claimant also complained of increasing forgetfulness. Dr. Shamsnia discussed the results of Claimant's diagnostic studies with him, stating that the nerve conduction studies of the upper extremities showed evidence of bilateral ulnar neuropathies, right carpal tunnel syndrome, and left radial sensory neuropathy. EX 2, p. 11.

Claimant returned for follow-up on August 17, 2002, and was experiencing a severe headache during the visit. Dr. Shamsnia noted that Claimant's headaches originated from the right side of his neck and extended to the right side of his head. The headaches were associated with nausea. On September 17, 2002, Dr. Shamsnia reviewed Claimant's MRI of the cervical spine which was conducted on September 11, 2002. The MRI revealed that Claimant had disc herniation at cervical levels 4-5 and 5-6. EX 36, p. 15. The "evoke potentials" performed on September 11 indicated that Claimant had a pinched nerve. On October 9, 2002, Dr. Shamsnia referred Claimant for consultation with a neurosurgeon regarding Claimant's cervical disc herniation, pinched nerve and cervical radiculopathies. EX 2, p. 65. Dr. Shamsnia stated that he wanted to determine whether Claimant could benefit from surgery. EX 36, p. 17.

Dr. Shamsnia reviewed the report authored by Dr. Steck dated January 20, 2003. He testified that he would not defer to Dr. Steck's opinion that conservative care was recommended for Claimant over surgery. Dr. Shamsnia stated that Dr. Steck did not discuss the evoke potential study which revealed that Claimant had radiculopathy. Dr. Shamsnia explained that Dr. Steck stated that conservative treatment was usually indicated on patients who had axial neck pain without neurological deficits, but Dr. Shamsnia noted that Claimant did have neurological deficits.

On January 29, 2003, Dr. Shamsnia noted that Claimant's complaints continued to increase in severity. Claimant reported that Vicodin no longer helped his pain, so Dr. Shamsnia prescribed Lortab 10. Upon examination, Claimant demonstrated a moderate degree of muscle spasm in the cervical paraspinal area. EX 2, p. 15. On February 26, 2003, Claimant complained of increased neck pain and numbness in his limbs. Claimant's Lortab was increased to three times per day. EX 2, p. 16.

On April 16, 2003, Dr. Shamsnia saw Claimant relating to the slip and fall injury Claimant sustained at Home Depot on April 5. Claimant complained of increased neck pain, severe shoulder pain, numbness in both arms, low back pain and a tingling sensation from his low back to his right leg. EX 36, p. 24. Dr. Shamsnia testified that Claimant made subjective complaints of aggravated neck pain as a result of his slip and fall accident. Dr. Shamsnia testified that until that day, Claimant had not complained of low back pain, so based on the history relayed to him, Dr. Shamsnia would attribute Claimant's back pain and aggravated neck injury to the Home Depot injury. Dr. Shamsnia performed a complete neurological examination of Claimant on April 16. The results indicated that Claimant had a moderate degree of spasm and a limited range of motion in his neck. His thoracic spine was normal. Claimant's lumbosacral spine and low back showed spasm in moderate degree, he had some loss of curvature in his low back, and had some difficulty bending and extending his trunk. Therefore, Dr. Shamsnia agreed it was fair to state that his objective findings of April 16, 2003, indicated that Claimant aggravated his neck injury and had findings of trauma with regard to his lower back due to the Home Depot accident. EX 36, pp. 26-27.

Claimant underwent further MRI studies of his lumbar and cervical spine on April 24, 2003 which showed that the disc herniations in his neck were more prominent since the slip and fall accident, and that he had a disc herniation at L5-S1 in his back. Dr. Shamsnia testified that the lumbar spine MRI revealed evidence of a traumatic event rather than degenerative changes. EX 36, p. 28. Dr.

Shamsnia said that his plan was to treat Claimant symptomatically with pain medication and muscle relaxants.

On July 16, 2003, Claimant presented to Dr. Shamsnia's office and stated he had been involved in a motor vehicle accident on July 3, 2003. Dr, Shamsnia's record of the visit states that the accident "exacerbated the patient's present symptoms." EX 2, p. 19. Claimant complained of severe neck pain and low back pain. Neurological examination showed significant muscle spasm in the cervical and lumbosacral paraspinal regions. Claimant had limited range of motion in the cervical and lumbosacral areas and was ambulating with a cane. Dr. Shamsnia recommended physical therapy.

Claimant returned on August 15, 2003, where Dr. Shamsnia noted that Claimant reported no improvement of his symptoms and continued to complain of pain. Dr. Shamsnia stated he would refer Claimant to Dr. Pribil for neurosurgical evaluation and consultation if Claimant's symptoms did not improve with conservative treatment. EX 2, p. 20. On September 17, 2003, Claimant presented to Dr. Shamsnia complaining of increased pain. Neurological examination showed spasms in Claimant's cervical and lumbosacral spine, and Dr. Shamsnia noted Claimant had a slight limp to his gait. He referred Claimant to Dr. Pribil for consultation and ordered repeat diagnostic studies. EX 2, p. 21.

On November 11, 2003, Claimant's symptoms were unchanged. He had not seen Dr. Pribil for consultation. Dr. Shamsnia noted that Carrier discontinued Claimant's physical therapy treatment. He discussed the side effects of Claimant's medication with Claimant, including the possibility of addiction. Claimant reported to Dr. Shamsnia that he was not receiving pain medication from any other source. EX 2, p. 23. Claimant's condition remained the same on January 13, 2004. On March 10, 2004, Claimant continued to complain of neck and low back pain without any significant improvement. Neurological examination showed flexed posture with muscle spasms in the lumbosacral area, and Claimant had limitations in flexion and extension of his trunk. He had no significant limitations of range of motion in his cervical spine, but did have muscle spasms in his shoulder area. EX 2, p. 25.

Dr. Shamsnia testified that on July 14, 2004, he saw Claimant who looked much better than he had previously. He said Claimant was only taking Lortab twice per day, and opined in his report that "in the process of getting treatment [Claimant] became dependent" on narcotic pain medication. EX 36, p. 45. Dr. Shamsnia testified that he does not have a background in treating drug addictions,

but wanted Claimant to see a psychiatrist. He was aware that Claimant was obtaining Lortab from other sources, and he limited Claimant's Lortab intake to the minimum dosage, explaining that Claimant could not stop taking Lortab suddenly. He believed that Claimant needed a drug rehabilitation program. EX 36, p. 46.

Dr. Shamsnia opined that Claimant's addiction to pain medication was a result of "a combination of all three injuries he had." EX 36, p. 47. He explained that Claimant began taking pain medication after his October 3, 2001 accident, but gradually he became addicted. Dr. Shamsnia said that part of Claimant's addiction was related to his October 2001 accident, but that accident was not the sole reason for his addiction. He believed there had been a cumulative effect, but said that he could not state definitively one accident and not the others related most to Claimant's addiction. EX 36, p. 48.

At his deposition, Dr. Shamsnia was asked to complete a report regarding Claimant's condition as of January 2003. EX 36, p. 32. Dr. Shamsnia testified that as of January 2003, Claimant could sit for eight hours intermittently, with the ability to stand and stretch if his back hurt. Dr. Shamsnia stated that Claimant could walk for eight hours intermittently, could stand for "probably two hours," could reach, or reach above his shoulder not more than half an hour per day. He opined that Claimant could perform general twisting of his body not more than half an hour per day, Claimant could bend and stoop half an hour per day, and could operate a motor vehicle two to three hours per day. EX 36, p. 36. Dr. Shamsnia said that Claimant would have been capable of pushing and pulling, but not for more than fifteen minutes and not more than ten pounds, and the same applied for lifting and squatting.

Dr. Shamsnia testified that as of January 2003, Claimant could have "done light duty work until the Home Depot accident." EX 36, p. 39. Following the Home Depot accident, Claimant was not capable of work at all. EX 36, p. 40. Dr. Shamsnia was shown a report issued by Dot Moffett-Douglas, a vocational counselor, which identified four potential employment positions for Claimant which were available in January 2003. Dr. Shamsnia was asked whether he believed Claimant was capable of performing the positions as of January 2003. He opined that Claimant could have performed the parking lot cashier job. He believed that Claimant was capable of performing the optometry assistant position "if it didn't require standing for a long period of time." EX 36, p. 43. Dr. Shamsnia did not believe Claimant could have performed the position of deli worker at a convenience store, because the job description was vague as to lifting

requirements and weight limitations; nor did he think Claimant was capable of performing the fast food worker position. EX 36, p. 44.

Dr. Shamsnia opined that since the automobile accident in July 2003, Claimant has been incapable of working. He said that currently, Claimant needs drug rehabilitation and counseling and needs to have a new set of MRIs performed, because new technology called a stand-up open MRI would permit a better diagnostic picture of Claimant's spine problems in order to better determine whether he is a candidate for surgery. Dr. Shamsnia stated that Claimant did not reach MMI prior to the Home Depot accident, nor had he reached MMI at the time of the deposition, because he needs to be re-evaluated, and Dr. Shamsnia believed that because of his subsequent accidents, Claimant would be a candidate for both neck and low back surgery. EX 36, p. 50.

On cross-examination, Dr. Shamsnia stated that muscle spasms are an objective finding, and a patient cannot stage them or force themselves to have spasms. He said Claimant had spasms on his first visit following his October 2003 work-related accident, and continued to have a moderate degree of spasm until and following the April 2003 accident at Home Depot. EX 36, p. 54. Dr. Shamsnia opined that Claimant was a candidate for surgery prior to the April 2003 accident, but said that the April 2003 accident made him more of a candidate. EX 36, p. 55. He said that Claimant's low back injury is solely related to the April 2003 accident at Home Depot.

Dr. Shamsnia opined that if Claimant worked light duty in January 2003, he would have experienced some level of pain during his work day, as evidenced by the fact that Claimant had continuous pain throughout every visit he had with Dr. Shamsnia. EX 36, p. 57. Dr. Shamsnia recalled having "some discussion" with Claimant about his narcotic medications, but was unaware that Claimant was receiving a prescription for narcotics from Dr. Watermeier for a wrist injury he sustained in previous employment. EX 36, p. 58. Dr. Shamsnia testified that Claimant was obligated to tell him or another physician that he was receiving pain medication from another source. He agreed that receiving medication from multiple sources would make it easier for Claimant to become addicted to the medication. He said that drug dependence or withdrawal causes behavior problems in patients, and if Claimant had an "outburst" with Dr. Awasthi, it could have been caused by drug dependence, because such patients become manipulative and try to obtain more narcotics. EX 36, p. 60.

John Steck, M.D.

Dr. Steck's deposition of September 9, 2004 is located at Employer's Exhibit 7; his records are found at Employer's Exhibit 6. Dr. Steck testified that he is a board-certified neurosurgeon who saw Claimant on January 20, 2003 in order to render an independent medical examination.

On January 20, 2003, Claimant presented to Dr. Steck with complaints of pain in the back of his neck, radiating suboccipitally, which is up the back of the skull. Claimant denied arm pain but mentioned that he had sneezed a few days earlier and developed electrical pain down his left arm. EX 7, p. 2. Claimant reported some numbness in the thumb, first and second fingers of his left hand and some numbness diffusely in his right hand. Dr. Steck reviewed a September 2002 MRI scan of the cervical spine, an EMG, and some records from Drs. Shamsnia and Awasthi. Dr. Steck reviewed both the MRI and its accompanying report. The report indicated an asymmetric prominence of the right side of the posterior surface of the C4-5 disc which most likely represented a focal disc herniation and broad-based central posterior herniation of C5-6 without subligamentous extensions. Upon his review, he found minimal abnormalities. On the sagital image, there was a very minimal area of focal protrusion at C5-6, which Dr. Steck opined was insignificant. The C4-5 study was "essentially normal." Dr. Steck did not think that Claimant had a herniated disc. EX 7, p. 3.

Dr. Steck's notes did not comment on Claimant's ability to return to work, but he testified that on exam, he found Claimant's upper and lower extremity strength to be normal, there was no atrophy, and reflexes were normal. Dr. Steck said that Claimant had a possibility of some subtle neurological changes, but said that a patient such as Claimant with those results on physical exam and an MRI which shows, in Dr. Steck's opinion, a minimal arthritic abnormality of a single cervical disc, can return to some type of work. Considering Claimant's physical exam, review of his medical records, and the MRI report, Dr. Steck opined that Claimant "more than likely could at least do sedentary or light-duty" work on January 20, 2003. EX 7, p. 4. Dr. Steck stated he would not totally disable any patient with those types of findings.

Dr. Steck did not believe that Claimant was a candidate for cervical spine surgery as of January 20, 2003, but he did recommend conservative care consisting of physical therapy, anti-inflammatory medications, and lifestyle modifications. He stated that spinal injections are considered conservative care but he did not believe injections would have been helpful to Claimant. He opined regarding

Claimant's prognosis that he was not at risk for any type of neurological injury, and any symptoms of pain he had would gradually go away with time.

Dr. Steck was provided Claimant's January 17, 2002 MRI which he reviewed and determined was normal. His record states: "I do not see the abnormality that Dr. Johnson is referring to on the MRI. Personally, I would not recommend surgery based on this study and the patient's current exam which is essentially normal." EX 6, p. 4. He said that Claimant did not complain of memory loss during the visit. Dr. Steck stated that it would be "very unusual" for a head injury to cause prolonged memory loss if there was no loss of consciousness at the time of the injury. EX 7, p. 6. Dr. Steck also reviewed a cervical and lumbar MRI performed on April 24, 2003, which he said showed the same slight irregularity at the C5-6 disc. Dr. Steck said that the MRI did not demonstrate that any significant change had occurred between the 2002 and 2003 MRIs.

On cross-examination, Dr. Steck stated that given that Claimant reported a history of loss of consciousness after his accident, it was possible that he had some memory loss. EX 7, p. 7. He agreed that the author of the initial MRI report saw some kind of abnormality in the exam, specifically, he stated that they both saw some sort of bulge, but the disagreement is how the bulge affects Claimant. He explained that a disc can cause pain by direct neural compression either on nerve roots in the lumbar spine, nerve roots in the cervical spine, or on the spinal cord. Dr. Steck said that when he examined Claimant, Claimant reported some radiculopathy in his arms to his hands, and this was reported in a way that could be correlated to the C5-6 nerve. EX 7, p. 9. Dr. Steck agreed that on January 20, 2003, he recommended a follow-up MRI, which he reviewed at the deposition and found to be "about the same" as the earlier MRI. Dr. Steck said he would not interpret Claimant's April 2003 MRI as indicating foraminal stenosis. EX 7, p. 10. Dr. Steck testified that arthritis can be caused by trauma, and if it is preexisting, it can be aggravated by trauma.

On redirect, Dr. Steck clarified that Claimant complained of radiculopathy on exam and had a relatively decreased pinprick on the left C6-7 and slight decreased hand grip on the right. Dr. Steck was not certain that this evidence indicated any true neurological deficit, but it made him "suspicious" that Claimant may have been having some compression of the left C7 root, which the studies did not show. Dr. Steck was concerned that Claimant may have had radiculopathy and therefore he recommended a repeat MRI. EX 7, p. 11. He explained that his notes state that Claimant "in general does not have any radiculopathy," because Claimant

was "not complaining of typical symptoms, aside from the isolated incident following a sneeze. EX 7, p. 11.[5]

Deepak Awasthi, M.D.

Dr. Awasthi is a board-certified neurosurgeon who was deposed on March 28, 2005. His deposition is located at Employer's Exhibit 37 and his records are found at Employer's Exhibit 5. Dr. Awasthi testified that he initially saw Claimant on November 21, 2002, on referral from Claimant's previous counsel. Dr. Awasthi said that his records did not reflect that he had any of Claimant's previous medical records available for reference at the first visit, though he did have a copy of Claimant's September 11, 2002 MRI. Claimant relayed a history to Dr. Awasthi at the first visit, where Claimant's chief complaint was neck pain. EX 37, p. 8. Claimant told Dr. Awasthi that he had a work-related accident on October 3, 2001, where he was "knocked out" and had a transient loss of consciousness. Dr. Awasthi stated that the significance of loss of consciousness is that if a patient did not lose consciousness, it is less likely that he sustained a concussive injury to the head. EX 37, p. 10.

Dr. Awasthi performed a neurosurgical examination on Claimant on November 21, 2002, which consisted of a physical examination: checking vital signs (blood pressure, pulse, and respiration), a head and neck examination to check for any trauma, a mechanical examination of the back and neck to determine range of motion, and whether any tenderness or spasms exist. The neurological examination concerns the patient's mental status, looks at cranial nerves, motor and sensory examination, walking examination, cognition, and coordination and reflexes. The results of Claimant's physical exam showed that his neck appeared to be in mild distress, as Claimant stated he could not move his neck due to pain. Dr. Awasthi noted muscle spasms and tenderness in Claimant's neck, and that he had significantly limited range of motion in his neck. EX 37, p. 12.

Dr. Awasthi reviewed Claimant's September 2001 MRI and a copy of the EMG study. He said the MRI revealed a central disc herniation at C5-6, as well as degenerative changes at that level and the one above. The EMG revealed both sides had a C-4 radiculopathy, which he explained meant there was some nerve root irritation. There was also evidence of ulnar neuropathy and right carpal tunnel syndrome. Dr. Awasthi's impression was that Claimant was having predominantly

[5] Dr. Steck's report states: "He, in general, does not have any radiculopathy. Just the other day, he had an episode when he sneezed and developed an electrical pain down the left arm to the hand. Today, he has some numbness in the thumb, first and second finger of the left hand and also some numbness diffusely in the right hand. He has not noted any gait abnormality." EX 6, p. 3.

cervical axial pain (neck pain), related to the trauma he sustained in October 2001. He felt that this led to disc herniation that was evident on the MRI scan and the symptoms Claimant presented with. It was Dr. Awasthi's opinion that Claimant had some kind of post-concussional syndrome, considering Claimant reported loss of consciousness and memory loss. EX 37, p. 15.

Dr. Awasthi said he explained to Claimant that several options existed in terms of treatment, including physical therapy, pain management, and a surgical option. He said Claimant "wanted to go towards the surgical option right away basically." Dr. Awasthi testified that surgery was not a necessity in November 21, 2002. EX 37, p. 16. The notes indicate that Dr. Awasthi tentatively scheduled Claimant for surgery on December 10, 2002. EX 5, p.4.

Dr. Awasthi next saw Claimant on December 9, 2002, where the note indicated that Claimant returned for "surgical decision-making." EX 5, p. 5. The note indicates that Claimant had been scheduled for a C5-6 anterior cervical discectomy and fusion, but Carrier would not approve the surgery without a second opinion. Dr. Awasthi testified that Claimant mentioned continuing neck pain, so Dr. Awasthi refilled Claimant's Lortab prescription. He noted that he did not perform a physical examination of Claimant at that visit. EX 37, p. 17.

Dr. Awasthi stated that he reviewed the report issued by Dr. Steck in January 2003. He was asked whether he agreed with Dr. Steck's statement that he would "not recommend surgical treatment but would recommend conservative care." Dr. Awasthi stated that he agreed with the statement "with the qualification that surgical treatment was certainly an option" for Claimant from Dr. Awasthi's perspective, but, he explained that he typically, as Dr. Steck does, recommends that patients consider conservative care first. He stated that Dr. Steck's recommendation was basically in line with his own recommendation for Claimant in November or December of 2002, though Claimant was given the option of surgery and that is what he chose.

Dr. Awasthi was shown a letter he was sent from Employer inquiring whether he agreed with Dr. Steck's recommendation against surgery and instead proceeding with a repeat MRI and physical therapy. Dr. Awasthi testified that he checked a box marked "yes" and signed the document on June 20, 2003. He testified that this meant that he agreed with Dr. Steck's recommendation. EX 37, p. 20.

Dr. Awasthi was asked to comment on Claimant's ability to work as of January 2003. Dr. Awasthi testified that Claimant was capable of sitting two to four hours, because he was having discomfort of the neck. Dr. Awasthi opined that Claimant was capable of walking and standing without limitation, and reaching below shoulder level for two to four hours. He did not believe that Claimant was capable of reaching above the shoulder. If twisting was performed at waist level, Dr. Awasthi did not see any time limitation. He stated that Claimant was capable of bending and stooping without limit, and thought that Claimant was capable of driving a motor vehicle for two to four hours. EX 37, pp 22-24.

Dr. Awasthi testified that as of January 2003, Claimant was capable of performing light duty work, which Dr. Awasthi understood to encompass the ability to sit or stand, sitting for no more that two to four hours with frequent breaks, no reaching above shoulder level, and no lifting, pulling, or pushing more than twenty pounds. EX 37, p. 26. Dr. Awasthi was asked specifically whether he believed that Claimant, as of January 2003, was capable of performing the positions identified in Ms. Moffett-Douglas' report. He opined that Claimant was capable of performing all of the jobs identified, including parking lot attendant, deli worker, optometric assistant, and fast food worker, provided that all positions would allow Claimant frequent breaks and "not too long periods of sitting." EX 37, p. 26.

The last occasion Dr. Awasthi saw Claimant was May 5, 2003. Dr. Awasthi could not recall if the visit was a scheduled appointment. Claimant complained of increasing low back pain and neck pain, and mentioned that he had recently slipped and fell at Home Depot. Dr. Awasthi testified that Claimant had never complained of low back pain prior to that day. He could not recall whether he performed a physical examination of Claimant that day because Claimant "basically came there demanding to have surgery," which he stated was very unusual. Dr. Awasthi said that Claimant had aggravated neck complaints that day. Dr. Awasthi stated that temporally, he would attribute Claimant's complaints of an aggravated neck injury to the Home Depot accident in April 2003. Because Claimant had never mentioned low back pain before, Dr. Awasthi also attributed that complaint to Claimant's April 2003 accident. EX 37, p. 31.

Dr. Awasthi was asked about portions of Claimant's hearing testimony where he stated that Dr. Awasthi "blew up" at him. Dr. Awasthi stated that he "probably did" slam his hand on the table after Claimant said he was sent by his lawyer to have surgery scheduled, because Dr. Awasthi will not allow a patient or a lawyer tell him whether a patient needs surgery. Dr. Awasthi said that he went to

telephone the lawyer and while he did, Claimant took his medical chart and left the clinic. EX 37, p. 32.

On cross-examination, Dr. Awasthi testified that in November 2002, both conservative care and surgery were reasonable options. He explained that he agreed with Dr. Steck's recommendation of no surgery as appropriate, but said that his approach is usually conservative care initially, and if it fails and the patient still has clinical problems and diagnostic studies which "are appropriately correlating," then to offer surgery. He said that in November 2002, Claimant had the "correlations" to make surgery an appropriate recommendation. EX 37, p. 36. Dr. Awasthi stated that taking narcotic medication can interfere with "wakefulness" and hand-eye coordination, therefore it is recommended that patients do not operate motor vehicles while taking narcotic medication.

Dr. Awasthi said that, hypothetically, if the scheduled surgery had been performed on Claimant on December 10, 2002, Dr. Awasthi would not have released Claimant to return to work in January 2003. He said the normal recovery time for the cervical surgery he planned for Claimant was approximately six weeks.

Crescent City Physical Therapy

Claimant's file from Crescent City Physical Therapy, located at Employer's Exhibit 8, indicates that his initial evaluation occurred on August 14, 2003 where Claimant exhibited pain with range of motion, decreased range of motion, pain at a level of nine or ten, point tenderness and tightness with palpitation, and pain with most activities. EX 8, p. 11. Claimant attended physical therapy sessions on March 4, 2004, March 8, March 10, March 11, March 15, March18, March 23, March 25, 26, and April 5.

Bernard Manale, M.D.

Dr. Manale treated Claimant for the injury he sustained to his arm while working for a former employer. Dr. Manale initially saw Claimant on February 9, 2000. He treated Claimant with a cast for his left wrist fracture and prescribed Soma and Vicodin. Apparently Claimant suffered another injury to the same hand while working for the same employer for which Dr. Manale also treated him. The records indicate that Dr. Manale saw Claimant through March 2001. EX 26.

Hospital Records

Records from Ochsner Hospital, primarily from the emergency room and pertaining to Claimant's earlier injuries sustained while working for other

employers are located at Employer's Exhibit 27. Records from East Jefferson General Hospital, following Claimant's automobile accident on July 3, 2003 are found at Employer's Exhibit 29. The records indicate that Claimant had whiplash, a lumbar strain, and a chipped tooth. He was treated with Vicodin and Skelaxin. EX 29, p. 4. The records from West Jefferson Medical Center from Claimant's October 3, 2001 work-related injury are found at Employer's Exhibit 31.[6]

Vocational Evidence

Dot Moffett- Douglas, M.A., L.R.C.

Ms. Moffett-Douglas testified via deposition on October 28, 2004. Her deposition comprises Employer's Exhibit 38; her records are found at Employer's Exhibit 34. Ms. Moffett-Douglas testified that she is a licensed vocational rehabilitation counselor and has worked in the field for over thirty years.[7] Ms. Moffett-Douglas met with Claimant to conduct an initial vocational assessment evaluation in order to ascertain Claimant's educational background, work history, and to determine whether he was employable.

Ms. Moffett-Douglas administered a WRAT examination to Claimant which measures reasoning and judgment and attempts to assign a corresponding grade level of functioning. Ms. Moffett-Douglas stated that Claimant tested at the first and second grade level for reasoning and math. EX 38, p. 3. Ms. Moffett-Douglas reported that Claimant told her he had reached the eleventh grade in high school. She questioned Claimant's WRAT score, and believed he should have scored higher due to his work history as a painter and sandblaster, which are both transferable skills at the tenth or eleventh grade level. In addition, Ms. Moffett-Douglas reviewed Claimant's personnel file which contained a safety warning he received and his written response, which Ms. Moffett-Douglas stated showed judgment above a first or second grade level of reasoning.[8]

Ms. Moffett-Douglas was aware that Dr. Steck opined that Claimant could work at a sedentary or light-duty level as of January 2003. Based on Dr. Steck's restrictions and Ms. Moffett-Douglas' knowledge of Claimant's injury and his educational and work histories, she identified several potential employment

[6] The records from West Jefferson Medical Center were discussed earlier.

[7] Ms. Moffett-Douglas is licensed by the state of Louisiana and the U.S. Department of Labor. EX 38, p. 2.

[8] Claimant received a warning for painting without wearing a face shield. In response, he wrote: "I had face shield on, I was painting overhead, so regardless when a person paints over head with the shield on, paint is still going to get on face." EX 35, p. 27; EX 38, p. 24.

positions in her October 4, 2003 report which were available in January 2003. The positions identified in Ms. Moffett-Douglas' report, all of which were located in Claimant's geographical area, included:

(1) Parking Lot Cashier at Standard Parking: Worker would sit in a parking booth and accept payments from customers and make change. Employer will train those who can count money. Position paid $6.00 per hour, full time.
(2) Deli Worker at Danny & Clyde's: Positions were available for deli workers at convenience stations throughout the greater New Orleans area. Worker would wait on customers, work cash register, stock the deli, itemize purchases and monitor gas pumps. Employer provided training and paid $6.50 per hour.
(3) Optometric Assistant at Eyemasters: Employer provided training for workers with a mechanical background to wait on customers, set up eye examinations and learn to fit glasses and contact lenses. Position paid $6.35 per hour.
(4) Fast Food Worker at McDonalds: Worker would wait on customers, itemize bills using preprogrammed cash register, where one key is pressed "and the computer does the rest," and prepare small food items such as french fries and soft drinks. Morning shifts, beginning at 6:00 a.m., were available and paid $5.50 per hour. EX 38, pp. 29-30.

Ms. Moffett-Douglas contacted the above employers and testified that all of the positions were available in January 2003. EX 38, p. 4. Ms. Moffett-Douglas stated that she was interested in Claimant's training background and made efforts to contact people who knew of his educational level. She spoke with Claimant's probation officer who had worked with him in the prison release program, who told Ms. Moffett-Douglas that Claimant did not require training, and because he was "so well-trained" as a roustabout, he made a direct placement into a roustabout position, which Ms. Moffett-Douglas characterized as having a transferable skill level equivalent to the tenth or eleventh grade.

On cross-examination, Ms. Moffett-Douglas explained that painting and sandblasting skills transfer at a tenth or eleventh grade level based on the Dictionary of Occupational Titles. EX 38, p. 5. She explained that General Education Development (GED) levels are comprised of reasoning, math and language development components. Each component receives a number corresponding to a required grade level for any given occupational position. Ms. Moffet-Douglas conceded that when considering which skills transfer to a

particular grade level of education, the quality of that individual's education would be a consideration. EX 38, p. 6. She stated that in her years of work experience she could not recall interviewing a sandblaster/painter who was illiterate. EX 38, p. 8. Ms. Moffett-Douglas agreed that her report states that she identified jobs based the restrictions contained in Dr. Steck's deposition, but conceded that a typographical error must have occurred as Dr. Steck had not been deposed as of January 20, 2003. EX 38, p. 9. She agreed that Dr. Steck's restrictions were not contained in his medical records, and she could not point to any record which stated that Claimant was released to sedentary or light-duty as of January 2003. EX 38, p. 10.

Ms. Moffett-Douglas was asked whether she considered Claimant's criminal history in attempting to locate potential employment for him and stated that she was aware of instances where individuals can be bonded, through their probation officer, to work with money. She also said that when she spoke with Claimant's probation officer or case worker and learned that Claimant was no longer on parole, she felt "fairly confident" that he would not have problems regarding employment so far as his convictions.

Ms. Moffett-Douglas identified positions in her September 3, 2003 report which were available in June 2003, including Cashier at Paris Truck Stop, where a position was available for a cashier with the potential to be promoted to supervisor at a video poker casino. The facility was open twenty-four hours per day and thus required night and weekend availability; the position paid $6.50 per hour. Also located was a Night Desk Clerk position at Best Western Bayou Inn, which would train a high school graduate as a motel desk clerk. The night shift position was available where the worker would register guests, assign rooms, accept payments and work the cash register. Wages were $6.50 per hour for a forty hour work week.[9]

Of the three positions identified in her September 2003 report, she agreed that Claimant was not suitable for the hotel desk clerk position because he was not a high school graduate, but maintained that he was a candidate for the parking lot cashier and truck stop cashier positions. She conceded that she did not consider Claimant's felony conviction when attempting to locate potential employment. She testified that she didn't know anything about Claimant's conviction, and considering the conviction, she was not sure if the Brick Oven Café would hire

[9] Page Five of Ms. Moffett-Douglas' September 2003 report is missing from Employer's Exhibit 34. This page presumably contained the first job she identified, from her testimony it can be ascertained that this position was Host at the Brick Oven Café. EX 38, p.14.

Claimant. She said that based on his past criminal record, she did not know which jobs would be available to Claimant. EX 38, p. 14.

On redirect, Ms. Moffett-Douglas clarified that she was aware that Dr. Steck was deposed in September 2004 where he released Claimant to sedentary to light work as of January 2003. Based on that deposition testimony, Ms. Moffett-Douglas issued her updated report on October 8, 2004, which contained four potential employment positions which adhered to Dr. Steck's restrictions and her understanding of Claimant's work history and educational background. EX 38, p. 15. She said that none of the positions identified in the October 2004 report took Claimant's criminal background into consideration.

Ms. Moffett-Douglas issued an addendum report dated April 13, 2005.[10] Ms. Moffett-Douglas reviewed the deposition testimony of Drs. Shamsnia and Awasthi, noting that both doctors testified that Claimant was capable of working light duty in January 2003, and that they both approved some of the positions identified in Ms. Moffett-Douglas' October 2004 report. In the supplemental report, Ms. Moffett-Douglas identified five potential employment positions, four of which were those contained in the October 2004 report, with additional information. The positions, and any new relevant information, included:

(1) Parking Lot Cashier at Standard Parking: same as previous description; this was sedentary employment with the ability to sit/stand at will. Employer would accept applications and hire those with past felony convictions, but each employee must pass a background check "for consideration of present criminal history."
(2) Deli Worker at Danny & Clyde's: Ms. Moffett-Douglas received an employment application which indicated that an applicant must list any felony convictions. She noted that the required lifting is fifteen to twenty pounds occasionally, and accommodations can be made to break a fifty pound box into smaller sections of twenty pounds each with help from the manager. This position consisted of making sandwiches and accepting payments from customers.
(3) Optometric Assistant at Eyemasters: Ms. Moffett-Douglas noted that this was light duty employment with frequent walking and standing and occasional sitting. She said the employer would accept applications from

[10] Claimant has filed an objection to this late exhibit, arguing that the record was left open specifically for the testimony of Claimant's treating physicians and Ms. Moffett-Douglas' deposition. However, due to many delays in deposing Claimant's physicians, I will allow Ms. Moffett-Douglas' supplemental report, because her new report is based on the testimony of Claimant's physicians.

and hire individuals with felony convictions, and high school was not required if the applicant had mechanical aptitude.

(4) Fast Food Worker at McDonalds: Ms. Moffett-Douglas stated that this position was light duty employment with frequent walking and standing for taking orders and occasional walking and constant standing for the sandwich makers. Sitting is rare, lifting and carrying was occasionally up to fifteen pounds. Ms. Moffett-Douglas spoke with personnel at McDonald's corporate headquarters and was informed that the employment application requires disclosure of all felony convictions within the past five years. She was told that the hiring policy depends on how long ago the felony occurred and the nature of the crime. Many restaurants are franchises so the owners have their own hiring policies.

(5) Cashier at Tropic Car Wash: Worker would work as cashier at car wash, accept payments from customers and make change. High school education is not required, and no background check is performed. Worker would alternate standing and walking with sitting on stool allowed to accommodate restrictions. Wages were $5.50 per hour in January 2003 and $6.75 per hour in April 2005.

Other Evidence

Personnel Records

Employer's Exhibit 35 contains various personnel records relating to Claimant's work for Employer, including applications for employment and disciplinary reports.

Wage Statements

Copies of Claimant's earnings from August 2001 through July 2002 are located at Employer's Exhibit 10.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence,

including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

Causation

Section 20(a) of the Act provides a claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP,* 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). In this instance, the parties have stipulated, and I find, that Claimant suffered an injury in the course and scope of his employment on October 3, 2001. However, the extent of that injury as well as the issue of Claimant's subsequent injuries are at issue.

When a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural or unavoidable result of the original work injury. *Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (1981). If, however, the subsequent progression of the condition is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, the employer is relieved of

liability for disability attributable to the intervening cause. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983). If the subsequent injury is not work-related, then, in a claim based on the work-related injury, the aggravation rule does not apply and only the portion of disability due to the work-related injury is compensable. *Leach v. Thompson's Dairy, Inc.* 13 BRBS 231 (1981); *Marsala v. Triple A. South*, 14 BRBS 39 (1981).

In *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998), the Fifth Circuit clarified its differing standards relating to supervening cause. The court noted that in *Voris v. Texas Employers Insurance Association*, 190 F.2d 929 (5th Cir. 1951), supervening cause was defined as an influence originating entirely outside of employment that overpowered and nullified the original injury. In *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981), the court held that a supervening cause is one which causes the condition to worsen. In *Shell Offshore*, the court affirmed the administrative law judge's findings that there was no supervening cause.

Employer asserts that the facts in this case satisfy either of the Fifth Circuit's standards. Employer notes that Claimant admitted that his neck pain was aggravated by his slip and fall accident at Home Depot and that he injured his back in that accident, statements which are affirmed by Dr. Shamsnia's findings of increased spasms in Claimant's neck and lower back following the Home Depot accident.

Claimant, on the other hand, argues that Dr. Steck opined that Claimant did not suffer any further injury as a result of the Home Depot or automobile accidents. Claimant also states that Dr. Awasthi relied only on Claimant's complaints of pain in determining that he suffered an aggravation. Claimant maintains that he needed surgery both prior to and following the Home Depot accident of April 2003.

In this instance, I agree with Employer and find that the Home Depot accident aggravated Claimant's neck injury and was the cause of his low back pain. Both Drs. Shamsnia and Awasthi opined that Claimant aggravated his neck and injured his low back as a result of his slip and fall. Dr. Shamsnia testified, and his notes revealed, that Claimant never complained of low back pain until after the Home Depot accident. I accept Dr. Shamsnia's opinion regarding this matter as he is the physician who saw Claimant most frequently. I cannot give as much credit to Dr. Steck's opinion on this issue as he saw Claimant only once and then in January 2003, three months before the Home Depot accident occurred.

Dr. Shamsnia, who saw Claimant shortly after the accident, spoke clearly regarding this matter when he stated that Claimant injured his low back and aggravated his neck as a result of the Home Depot accident. Dr. Awasthi saw Claimant on May 5 and stated that he would attribute Claimant's complaints of aggravated neck pain and new complaint of low back pain to the Home Depot accident. There is nothing in the record which leads me to believe that Claimant's slip and fall and subsequent automobile accident were "natural and unavoidable" results of his work-related injuries.[11] Rather, I find that the subsequent accidents were supervening causes which in the case of Claimant's neck injury, aggravated his work injury, and in the case of his low back pain, was the triggering event of that injury. Therefore, Employer is responsible for only the disability and medical treatment attributed to Claimant's October 3, 2001 accident.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement (MMI) is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979). In this case, the parties do not dispute that Claimant has not reached maximum medical improvement. Therefore, any compensation awarded to Claimant will be temporary in nature.

[11] *See, e.g., Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2 454 (9th Cir. 1954) (Claimant's second leg injury sustained at home was due to leg instability resulting from his first, work-related knee injury); *Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14, *aff'd mem.,* 901 F.2d 1112 (5th Cir. 1990) (claimant's condition due to his work related injury led to him falling from his truck, so second injury was the natural and unavoidable result of the first injury).

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment due to his work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

In this case, Claimant has established that he cannot return to his previous occupation as a sandblaster. Claimant's treating physician, Dr. Shamsnia, removed him from his previous work and stated that prior to his accident at Home Depot, he was capable only of performing light duty. Dr. Steck testified that Claimant was capable of performing sedentary to light work, and Dr. Awasthi believed Claimant was capable of light work. None of the physicians who treated Claimant opined that he was capable of returning to his usual occupation of sandblaster; therefore, the burden shifts to Employer to establish the availability of suitable alternative employment.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which the claimant is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir.

1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992). However, for job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *P & M Crane Co.*, 930 F.2d at 430.

In this case, Claimant asserts that Employer has not established suitable alternative employment because the potential positions identified by Ms. Moffett-Douglas were not based on any physician's work release, and she relied on Dr. Steck's deposition testimony rendered a year and a half after seeing Claimant. Further, Claimant argues that Ms. Moffett-Douglas neglected to consider Claimant's past criminal history when she located potential employment positions. Employer contends that it has not only satisfied, but exceeded the *Turner* burden in that Ms. Moffett-Douglas issued three reports, each identifying suitable alternative employment for Claimant at critical times.

I agree with Employer and find that it has demonstrated the availability of suitable alternative employment. Drs. Shamsnia, Awasthi, and Steck all opined that Claimant was capable of sedentary to light duty employment as of January 20, 2003. I specifically find that the parking lot cashier position constituted suitable alternative employment for Claimant. Drs. Shamsnia and Awasthi approved this job, and it was described as a sedentary position, which Dr. Steck indicated Claimant was capable of. Ms. Moffett-Douglas contacted the employer, Standard Parking, and was informed that Standard Parking will accept applications from and hire individuals with previous felony convictions provided they pass a background check.

Dr. Shamsnia, Claimant's treating physician, did not approve the deli worker or fast food worker positions, and stated that Claimant could perform the optometric assistant position "if it didn't involve standing for a long period of time." EX 36, p. 43. Ms. Moffett-Douglas' most recent report clarified some aspects of the position when she stated that it involved frequent standing and walking and occasional sitting, but I cannot ascertain whether this would adhere to

Dr. Shamsnia's requirements. Therefore, I cannot determine that this position constitutes suitable alternative employment. Accordingly, Employer has established suitable alternative employment in the form of the parking lot cashier position at Standard Parking.

When suitable alternative employment is shown, the wages which the new positions would have paid at the time of the claimant's injury are compared to the claimant's pre-injury wage in order to determine if he has sustained a loss in wage-earning capacity. *Richardson v. Gen. Dynamics Corp.*, 23 BRBS 327, 333 (1990). Total disability becomes partial disability on the earliest date that the employer establishes suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (2d Cir. 1991). The ultimate objective in determining wage earning capacity is to determine the wage that would have been paid in the open market under normal employment conditions to the claimant as injured. *Devillier v. Nat'l Steel & Shipbuilding*, 10 BRBS 649, 660 (1979).

In this instance, the parking lot attendant position with Standard Parking paid $6.00 per hour, forty hours per week, resulting in a weekly wage of $240.00. Mindful, however, of the fairness concerns expressed in *Richardson v. General Dynamics Corp.*, Claimant's wages are adjusted to reflect their actual value at the time of Claimant's October 2001 injury. The National Average Weekly Wage (NAWW) for October 2001 was $483.04, and the NAWW for January 2003 was $498.27. Thus, the 2001 NAWW was approximately 97% of the 2003 NAWW. Therefore, the wages must be adjusted accordingly. Based on these adjustments, I find that Claimant has a residual wage earning capacity of $232.80 per week.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atl. Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

Having found that Claimant suffered a compensable, work-related injury on October 3, 2001, Claimant is entitled to reasonable and necessary medical care to treat his injury, including the treatment provided by Dr. Shamsnia, Claimant's choice of physician. At the hearing, Claimant's counsel stated that Claimant seeks the surgery that was originally scheduled for December 10, 2002, a drug detoxification program, and rehabilitation supervised by a psychiatrist.

Claimant was scheduled for surgery prior to his two subsequent accidents. Consequently, because both Drs. Shamsnia and Awasthi thought Claimant's need for surgery legitimately existed prior to his other accidents and because Claimant had elected surgery at that time which was denied by Employer, I am persuaded by these opinions over that of Dr. Steck's who saw Claimant on one occasion and prescribed only continued conservative treatment. In sum, I find the medical evidence supports the conclusion that cervical surgery was an appropriate option even before the other two accidents in Claimant's life. Consequently, the expense of such surgery is the responsibility of the Employer. Any need for any low back treatment Claimant may require, however, is not attributable to his October 3, 2001 accident.

With regards to Claimant's drug detoxification program, I agree that such treatment was recommended by Dr. Shamsnia, but I do not find that Claimant's drug addiction was related to the injury he sustained at work. Claimant testified, and the records establish, that he was involved in a previous work-related accident for which he treated with Drs. Manale and Watermeier. Claimant testified that he received narcotic pain medications from those doctors as well. Further, Claimant did not receive Lortab from Dr. Shamsnia until January 29, 2003. Dr. Shamsnia testified that Claimant's addiction to pain medication was attributable to all three of his accidents, and could not say that that his work related injury was the sole cause of Claimant's addiction. Also, Dr. Shamsnia was unaware of the fact that Claimant was receiving narcotics from multiple sources but testified that Claimant had an obligation to report to his physicians that he was receiving narcotics from another source because it was easier to become addicted to medications when they were abundantly available. Consequently, because Claimant had a history of drug use prior to his October 3, 2001 accident and because his use of these pain medications continued after his other unrelated accidents, I find the drug detoxification program and/or rehabilitation supervised by a psychiatrist is not Employer's responsibility.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 320 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990). The determination of an employee's annual earnings must be based on substantial evidence. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment, not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. Gen. Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10(a) should apply. *Duncan v. Wash. Metro. Areas Transit*, 24 BRBS 133 (1990).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment but did not work the whole of the year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (5th Cir. 1991). Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in same or similar employment, in the same or neighboring place.

Section 10(c) is a catch-all to be used in instances where the methods in 10(a) and 10(b) cannot realistically be applied. 10(c) is used where the claimant's employment is seasonal, part-time, intermittent or discontinuous, or where 10(a) or 10(b) cannot reasonably and fairly be applied and therefore do not yield an average weekly wage that reflects the claimant's earning capacity at the time of the injury. *Empire Untied Stevedores*, 936 F.2d 819 at 823, 25 BRBS at 26. Section 10(c) is also applicable where there is insufficient evidence in the record to make a determination of average daily wage under either 10(a) or 10(b). *Sproull*, 25 BRBS at 104; *Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137, 140 (1990).

The objective of 10(c) is to reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of injury. *Empire United Stevedores*, 936 F.2d 819, 823, 25 BRBS at 26. The administrative law judge has

broad discretion in determining annual wage earning capacity under 10(c). *Sproull*, 25 BRBS at 105; *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). Actual earnings are not controlling. *Nat'l Steel & Shipbuilding v. Bonner*, 600 F.2d 1288 (9th Cir. 1979), *aff'g in relevant part* 5 BRBS 290 (1977). Thus, the amount actually earned by the claimant at the time of injury is a factor but is not the overriding concern in calculating wages under 10(c). *Empire Unties Stevedores*, 936 F.2d at 823, 25 BRBS at 26.

The parties agree that Claimant's average weekly wage should be determined using 10(c), but differ in the figures yielded by application of that section. Claimant, stating that the purpose of 10(c) is to identify the wages Claimant earned at the time of the accident, suggests multiplying his wage at the time of injury of $15.00 per hour times forty hours per week, resulting in an average weekly wage of $600.00. Employer, on the other hand, argues that Claimant worked for Employer only eight weeks prior to the accident, and of those eight weeks only one was a forty hour work week, and that his wages of $3220.50, when divided by fifty-two, produce an average weekly wage of $61.93. Thus, because this figure is lower than the minimum compensation rate, Employer contends that the minimum average weekly wage of $362.28 and corresponding minimum compensation rate of $241.52 is the correct calculation.

Employer's payroll records indicate that Claimant was hired on August 3, 2001. Claimant has presented no evidence or testimony regarding his employment prior to that date. Therefore, Claimant's earnings for those eight weeks prior to his accident are controlling for establishing his average weekly wage at the time of his accident.

The records indicate that Claimant worked 214.7 hours, was paid $15.00 per hour, and earned $3220.50 before his accident. Contrary to Claimant's suggestion, it is evident that Claimant did not work an average of forty hours per week, in fact, he worked, on average, 26.8 hours per week. However, neither do I accept Employer's suggestion of dividing Claimant's earnings of eight weeks by fifty-two. The method which I find to comply with the purpose of Section 10(c), that is to determine a reasonable approximation of Claimant's earnings at the time of injury, is to divide his gross earnings by the weeks he actually worked, resulting in an average weekly wage of $402.56.[12]

[12] $3220.50 divided by 8 equals $402.56, multiplied by 52 to ascertain Claimant's average annual earnings of $20,933.12, divided by 52 equals $402.56.

Section 14(e) penalties

Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer paid benefits on October 4, 2001. Therefore, as Employer paid compensation within 14 days of learning of injury, no § 14(e) penalties are assessed against Employer.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer shall pay to Claimant compensation for temporary total disability from October 3, 2001 to October 17, 2001 and again from July 24, 2002 to January 20, 2003, based on an average weekly wage of $402.56;

(2) Employer shall pay to Claimant compensation for temporary partial disability from January 20, 2003 and continuing, based on an average weekly wage of $402.56, reduced by a wage-earning capacity of $232.80;

(3) Employer/Carrier shall pay all reasonable and necessary medical expenses related to Claimant's October 3, 2001 neck injury;

(4) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(5) Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(7) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

So ORDERED this 26th day of May, 2005, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:bbd